Supreme Court, U.S.
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NO. 01-1360

IN THE
Supreme Court of the United States

RANDALL C. SCARBOROUGH,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. The most striking feature of the government's opposition, and its only feature that bears on whether review is appropriate, is its repeated acknowledgment of a direct conflict in circuit authority on the question presented. *See, e.g.*, Opp. 4 (explaining inconsistency of Federal Circuit's ruling with rulings of Third and Eleventh Circuits); *id.* at 11 (acknowledging "conflict in the circuits on the question presented" and contrasting the Federal Circuit's rule with "the rule in the other circuits"). The government nevertheless argues that review should be denied because the conflict "creates no material inconsistency" as lawyers "in the Federal Circuit are on notice" of its strict, albeit aberrational, rule concerning the jurisdictional prerequisites for EAJA applications. *Id.* If that were a proper basis for denying certiorari, however, this Court would never grant review in a case where it could be said that the rule imposed by the court of appeals does not affect "primary conduct," *see id.*, and that litigants need only adhere strictly to that rule no matter how technical, picayune, or at odds with Congressional intent.

But this Court consistently rejects that approach. *See, e.g., Becker v. Montgomery*, 532 U.S. 757 (2001) (entertaining question whether requirement that notice of appeal be signed is jurisdictional or subject to amendment after time to appeal has run); *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990) (entertaining question whether Title VII's limitations period must be strictly applied in all cases or is subject to exceptions); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (entertaining question whether requirement that notice of appeal name all appellants must be literally followed or "et al." designation is sufficient in some circumstances); *Foman v. Davis*, 371 U.S. 178 (1962) (entertaining question whether appellant must strictly comply with requirement that notice of appeal refer specifically to order appealed from or may court

look beyond notice to ascertain appellant's intent). In each of these cases, a court of appeals had put future litigants on notice that the relevant rule would be strictly observed without exception, yet the Court granted certiorari to determine the correct outcome and promote national uniformity on an important issue of federal law.

Quite apart from promoting uniformity, the Court should grant review for a more fundamental reason. The government's rationale for overlooking the circuit split presupposes that no important purpose is served by a rule that permits flexibility in construing a Congressional limitations period. That is not so. Doctrines that allow amended pleadings and motions to "relate back" to the original filing date, and concepts of equitable tolling, estoppel, waiver, and the like do, in fact, serve an important purpose: They recognize that both lay people and lawyers sometimes make procedural errors, and they ask whether, under the circumstances, those errors ought to be excused because the benefit of doing so outweighs the harm created by strict imposition of a time bar or other procedural rule. Thus, the government's position — that future EAJA fee applicants in the Federal Circuit can avoid a problem by strictly adhering to the 30-day time period — simply assumes the answer to the basic question whether Congress intended that the substantive goals of EAJA would be best served by a strict jurisdictional time bar or by a more flexible rule such as that adopted by the Third, Sixth, and Eleventh Circuits.[1]

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[1]Strangely, while acknowledging that the opinion below conflicts with the rulings of the Third and Eleventh Circuits, the government's opposition (like the Federal Circuit's opinion) ignores

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2. Seeing no way around the circuit split, the government's first argument and the bulk of its opposition is devoted to the proposition that the Federal Circuit's holding is correct. Opp. 5-10. That a respondent believes that the decision below is correct is not a sufficient reason to leave a split in appellate authority unresolved, especially where three circuits fundamentally disagree with respondent's position on the question presented.

a. As the Third, Sixth, and Eleventh Circuits have explained, even assuming that the 30-day filing deadline is jurisdictional and admits of no exceptions, there is no reason to believe that Congress intended that jurisdictional bar to apply to the contents of the fee application. *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1985); *United States v. True*, 250 F.3d 410 (6th Cir. 2001); *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000). Rather, as those courts have explained, once a timely fee application is filed, EAJA's concerns with timeliness, finality, and reliance "have been satisfied[,]" *see, e.g., Dunn*, 775 F.2d at 104, and there is no basis for extending the 30-day time limit to EAJA's pleading requirements. As a result, those courts have permitted supplementation of a timely fee application, absent prejudice to the government.

b. In any event, the government is unable to deal with the fact that the statute's limitation period is contained in a separate sentence from the statute's requirement that the party allege that the position of the United States was not

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[1](...continued)
the Sixth Circuit's ruling in *United States v. True*, 250 F.3d 410 (6th Cir. 2001), which, as discussed in the petition (at 13), directly conflicts with the decision below.

substantially justified. That is a problem for the government because even if it could be said the statute's other pleading requirements must be completed within 30 days — a conclusion flatly rejected by *Dunn*, *True*, and *Singleton* — that cannot be said for the no-substantial-justification allegation. The government's only response is to speculate that Congress placed what an application must "show" in a different sentence from what a party must "allege" in "an effort to preserve parallel sentence structure." Opp. 6 n.1. Even if the government were correct that it would have been grammatically difficult to list all four pleading items in the first sentence of 28 U.S.C. § 2412(d)(1)(B), that would not explain why Congress did not also include the 30-day time period in the second sentence of that section if it wanted that sentence to bear the meaning given to it by the Federal Circuit.

In any event, use of two separate sentences was not a matter of grammatical necessity. If Congress had wanted to merge the two sentences into one, it could have done so very easily, just as the Solicitor General has done twice in its opposition. Opp. 9, 5-6; *see also* Pet. App. 4a (tabulating EAJA's four pleading requirements in one sentence). Thus, when construing the two distinct and differently-worded sentences of section 2412(d)(1)(B), courts should apply the "general[] presum[ption] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *See, e.g.*, *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (internal quotation marks and citation omitted); *cf. Edelman v. Lynchburg College*, 122 S. Ct. 1145 (2002) (limitations period for filing Title VII charge of discrimination contained in one subsection of 42 U.S.C. § 2000e-5 does not apply to other subsection's requirement that charge be verified).

c. Even assuming that Congress contemplated that section 2412(d)(1)(B)'s pleading requirements be met within the 30-day period, that period is not a "jurisdictional" time bar, but rather a statute of limitations subject to equitable exceptions. *See* Pet. 17-19. As such, an amendment to an EAJA fee application, such as the amendment filed by petitioner just days after the government moved to dismiss his application, may "relate back" to the original filing date, *see Edelman*, 122 S. Ct. at 1151; *see also Becker v. Montgomery*, 532 U.S. 757 (2001); Fed. R. Civ. P. 15(c), and fee applicants may avoid dismissal under equitable doctrines such as tolling, estoppel, and waiver, absent prejudice to the government.

The government claims that section 2412(d)(1)(B) is jurisdictional, but ignores the governing authority, *Irwin v. Department of Veterans Affairs*, 498 U.S. at 94-96, which recognized a strong presumption that Congressionally-established filing periods for claims against the government, like those involving private defendants, are non-jurisdictional statutes of limitations, subject to equitable principles. Unable to respond to *Irwin*, the government relies solely on an assertion that the "Senate Report on the bill that became the 1985 EAJA" said that the filing period "is jurisdictional and cannot be waived." Opp. 7 (quoting S. Rep. No. 98-586 16 (1984)). Even if the government's assertion were correct, a single snippet in a committee report cannot overcome the principle of statutory construction set forth in *Irwin*, which may only be rebutted if "Congress ... provide[s] otherwise." *Irwin*, 498 U.S. at 96.

In any event, the government's assertion is incorrect. In fact,"[n]o Senate Report was submitted with th[e] legislation" that was enacted by the 99th Congress in 1985. 1985 U.S.C.C.A.N. 132. The committee report cited by the government is not legislative history at all because it was

prepared for a 1984 version of EAJA passed by the *98th Congress* and *vetoed* by the President. *See* H.R. Rep. No. 99-120 (I) 6 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 134; *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring). The inherent unreliability of the report upon which the government rests its position is made plain by the more in-depth House Report from the *99th Congress* that accompanied the bill that actually became law in 1985. That report contains the same general discussion of the statute's limitations period and cites the same authority as did the earlier 1984 report, *but it omits the language upon which the government relies.* H.R. Rep. No. 99-120 (I) 19-20 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 148. Indeed, it would have been anomalous for the 99th Congress to have made the filing deadline strictly jurisdictional because, at the same time, it urged that the deadline not be construed in an "overly technical" manner as a "trap for the unwary." *Id.* at 18 n.26; H.R. Rep. No. 99-120 (II) 6 & n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 151, 156. In sum, there is no basis for the government's assertion that EAJA's 30-day filing period is an absolute jurisdictional bar.

d. On the question whether tolling applies here, the government relegates to a footnote (Opp. 12 n.7) its conclusory rejection of our contention that petitioner "actively pursued his judicial remedies by filing a defective pleading during the statutory period[.]" *Irwin*, 498 U.S. at 96. However, it does not dispute that this formulation is one of the time-honored bases for tolling. *See also Young v. United States*, 122 S. Ct. 1036, 1041 (2002) (reiterating that formulation). And the government does not question whether, as a factual matter, petitioner meets that standard. Even if one agrees with the government that petitioner's application was defective, there is no question that it was timely filed "during the statutory period." Indeed, petitioner twice submitted his fee application to the Court of

Appeals for Veterans Claims ("CAVC"), at a point the CAVC Clerk deemed premature, and the Clerk filed it on the *first day* of the 30-day period. Absent impropriety on petitioner's part or prejudice to the government, the period should have been tolled, even assuming that the application was otherwise time barred.

Petitioner's other claimed basis for tolling is that his purported error was induced by the government's misconduct. On that issue, we rest mainly on the petition (at 19-20), and respond to only one argument. The government relies on the CAVC's order providing the government an extension of time to file its response, *see* Opp. 13, but that extension is quite beside the point. The salient point is that, before obtaining that extension, the government had a clear duty under CAVC Rule 39 to respond to the application, and *that response* would have put petitioner on notice of the alleged defect well before the 30-day period had run (indeed, before it had begun to run). If the government had followed the rules, the application would have been heard on its merits promptly and efficiently, which is, according to the government, the overriding purpose of the 30-day filing period. *See* Opp. 8. It is simply intolerable for the government to impose a time bar on an EAJA applicant on the theory that EAJA requires "litigants to turn square corners and make a timely filing," *id.*, where the problem would have been avoided if the government itself had "turn[ed] square corners" and followed the applicable rule.[2]

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[2]The government asserts that the tolling issue and the "antecedent question of whether EAJA's pleading requirements are subject to equitable tolling," Opp. 12, is not before the Court because the Federal Circuit did not address them. With all respect, that assertion is frivolous. The Federal Circuit did not *explicitly* address those issues for an obvious reason: It held, contrary to the rule in

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3. One other point raised by the government warrants a brief response. The government argues that the decision below will not prejudice fee applicants too greatly because "as long as an applicant timely alleges the basic jurisdictional prerequisites under EAJA," Opp. 11-12, the applicant will be granted "'some latitude to supplement his application to flesh out the missing details.'" Opp. 12 (quoting Pet. App. 8a). The "some latitude" standard is imprecise and does not apprise fee applicants of what is expected or provide guidance to the lower tribunals under the Federal Circuit's jurisdiction. Nor can one gain comfort from how the Federal Circuit has applied that standard to date, especially in light of the high volume of EAJA cases within the Federal Circuit's jurisdiction. *See* Pet. 5 & n.1, 16-17. That court has excused an EAJA applicant's failure to

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[2](...continued)
three other circuits, that EAJA's pleading requirements are "jurisdictional" and not subject to *any* exceptions, Pet. App. 5a-9a, which is precisely why it did not accept petitioner's amendment supplying the no-substantial-justification allegation. Pet. App. 10a. Thus, the Federal Circuit believed that it was without power to consider any reason provided by petitioner to excuse any alleged non-compliance with the 30-day deadline. Contrary to the implication in the government's opposition (at 12 n.6), petitioner raised equitable tolling and estoppel, as well as the equitable principles enunciated in *Dunn* and *Singleton*, in both his opening and reply briefs in the Federal Circuit. Brief for Appellant, at 5-10, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Sept. 29, 2000); Reply Brief for Appellant, at 3-5, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 24, 2001). Indeed, the government acknowledged petitioner's arguments on this score, and asserted that, regardless of the facts, petitioner's application was barred because the 30-day period imposed an absolute jurisdictional bar. Brief for Respondent-Appellee, at 7 n.4, in *Scarborough v. Gober*, No. 00-7172 (Fed. Cir. Jan. 9, 2001).

make any allegation about his eligibility for fees (net worth) on the ground that the net-worth allegation is "subsumed" by an applicant's statement that he was the prevailing party, *see Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998), even though the two concepts are unrelated. By contrast, the Federal Circuit affirmed the dismissal of petitioner's application, which similarly contained the prevailing-party allegation, on the ground that it did not include a no-substantial-justification allegation, even though the two concepts are intimately related to one another, since both concern how the government fared on the merits of the litigation. Thus, far from providing a reason to deny review, the government's embrace of the "some latitude" standard underscores the need for this Court to grant the petition and resolve the split in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

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